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The nation's voice for condominium, cooperative and homeowner associations

January 22, 2001

Ms. Magalie Roman Salas, Secretary
Office of the Secretary
Federal Communications Commission
445 12th Street, SW, TW-A325
Washington, DC 20554

88-57/

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JAN 22 2001

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: First Report and Order and Further Notice of Proposed Rulemaking in WT
Docket 99-217, Fifth Report and Order and Memorandum Opinion and Order in CC
Docket No. 96-98, and Fourth Report and Order and Memorandum Opinion and
Order in CC Docket No. 88-57

Dear Ms. Salas:

Pursuant to the First Report and Order and Further Notice of Proposed Rulemaking in
WT Docket 99-217, Fifth Report and Order and Memorandum Opinion and Order in CC
Docket No. 96-98, and Fourth Report and Order and Memorandum Opinion and Order in
CC Docket No. 88-57, the Community Associations Institute hereby files an original and
six copies of their Comments. CAI files an original and four copies. A copy of the
Comments is being submitted to International Transcription Services.

CAI appreciates the opportunity to submit its Comments and Response to the
Commission in this proceeding.

Sincerely,

STEVEN J. ERD

Director, Government & Public Affairs

225 Reinekers Lane, Suite 300
Alexandria, VA 22314-2875
(703) 548-8600
Fax (703) 684-1581
www.caionline.org

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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JAN 22 2001

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of) WT Docket No. 99-217
)
Promotion of Competitive Networks) CC Docket No. 96-98
In Local Telecommunications Markets)
) CC Docket No. 88-57
)

To: The Commission

**COMMENTS OF
COMMUNITY ASSOCIATIONS INSTITUTE**

COMMUNITY ASSOCIATIONS INSTITUTE

By: _____
Robert M. Diamond, Former President

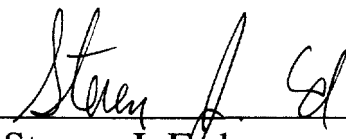
By:  _____
Steven J. Erd
Director, Government and Public Affairs

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I. INTRODUCTION

The Community Association Institute¹ ("CAI") submits these comments in response to the First Report and Order ("Report and Order") and Further Notice of Proposed Rulemaking ("Further Notice") in WT Docket No. 99-217, Promotion of Competitive Networks in Local Telecommunications Markets released on October 25, 2000. CAI first filed comments on this docket on August 27, 1999 in response to the Notice of Proposed Rulemaking and Notice of Inquiry released on July 7, 1999. Rather than summarizing or restating the arguments set forth in CAI's earlier comments, reference is made to those comments.

In these comments, CAI applies its earlier positions to the Commission's new proposals, reports the results of a survey of community associations regarding their actual experiences in dealing with telecommunications providers and advocates a unified and practical approach to the regulation of telecommunication issues.

¹ Founded in 1973, the Community Associations Institute (CAI) is the national voice for 42 million people who live in more than 220,000 community associations of all sizes and architectural types throughout the United States. Community associations include condominium associations, homeowner associations, cooperatives and planned communities.

CAI is dedicated to fostering vibrant, responsive, competent community associations that promote harmony, community and responsible leadership. CAI advances excellence through a variety of education programs, professional designations, research, networking and referral opportunities, publications, and advocacy before legislative bodies, regulatory bodies and the courts.

In addition to individual homeowners, CAI's multidisciplinary membership encompasses community association managers and management firms, attorneys, accountants, engineers, builders/developers, and other providers of professional products and services for community homeowners and their associations. CAI represents this extensive constituency on a range of issues including taxation, bankruptcy, insurance, private property rights, telecommunications, fair housing, electric utility deregulation, and community association manager credentialing. CAI's over 17,000 members participate actively in the public policy process through 58 local Chapters and 26 state Legislative Action Committees.

II. SUMMARY OF ARGUMENT

In these Comments, CAI makes the following arguments:

- A. Expansion of the non-discriminatory access requirements to residential housing is unwarranted and does not foster competition.
- B. Extending the Pole Attachment Act infringes on community association rights by interfering with existing easements. This proposal would unconstitutionally and unilaterally modify an easement between a community association and a specific utility to include all telecommunications providers.
- C. Community associations should retain the ability to enter into exclusive contracts with service providers. Although the FCC has banned exclusive contracts in commercial buildings, CAI contends that market forces in the residential market may require such contracts to help insure the availability of telecommunications services to residents of community associations

III. COMMENTS ON REPORT AND ORDER/MEMORANDUM OPINION AND ORDER

A. Exclusive Contracts. The Commission prohibits exclusive contracts between telecommunications providers and commercial property owners. CAI does not believe that such a prohibition promotes competition in the provision of telecommunications services to commercial properties and commercial tenants. However, the Further Notice proposed extending the prohibition to residential properties. Our members have had direct experience over the past several years in trying to obtain competitive telecommunications services for their communities. The problem was not that exclusive contracts kept out providers, but rather that without an exclusive contract a

provider would not risk the infrastructure investment necessary to provide services. Almost all our builder/developer members contract for the installation of broadband telecommunications services in any new building or new community. Without a secure source of recovery of infrastructure costs, providers have not been willing to take that risk. In short, extension of the Commission's prohibition on exclusive contracts will decrease competition and retard the availability of telecommunications options to residents of community associations.

B. Access to Conduits and Rights-of-Way. The Report and Order mandates that if an incumbent local exchange carrier ("ILEC") or a utility owns or controls conduits or other rights of way that are located inside of multiple tenant environments ("MTE's"), the phone company or utility must provide reasonable and nondiscriminatory access to those conduits and rights-of-way controlled by the utility. On its face, this seems to regulate the operation of the ILEC or utility, affecting the way in which it may conduct business. However, in reality the FCC is interfering with the private property rights of the owners. Unless the consent of the community association or owner is also required, the requirement effects an expansion of the ILEC's or utility's easement rights without the consent of the owners, without compensation to the owners and without a corresponding benefit to the owners. In a free market, owners can negotiate the terms of easements and access rights with telecommunications' providers; if the effect of this regulation is to obviate the consent of the community association or the owner, all this new mandate does is take away their negotiating power with the provider.

It is "black letter law" that the scope of an easement cannot be modified without the consent of the owner of the property subject to the easement. An easement allowing me to cross Blackacre does not permit you to cross Blackacre even if someone ordered me to let you do so. The property

rights affected do not belong to the ILEC or the utility even if the wire or the conduit does; the property rights belong to the property owner. To the extent that the FCC mandate expands the scope of a private easement without the consent of the property owner, it is an unconstitutional taking without compensation under the Fifth Amendment to the U.S. Constitution.

Further, the practical impact of such a mandate is unworkable. When a provider's wire, cable or fiber leaves the ILEC's or utility's easement, it must still connect to the resident who is the customer. This necessitates an impermissible intrusion onto the owner's property to service that customer. This is a serious problem for many community associations where access control for security purposes is a vital (and costly) amenity of their community.

The second practical problem is the finite capacity of conduits and rights-of-way. Only so many providers can run wire, cable or fiber in the same space. The FCC mandate removes that choice from the non-profit community association which is democratically run by the owners (and from the owner who is motivated by profit to satisfy his residents) and thrusts it upon an ILEC or utility which is given no choice, has no incentive to ensure resident satisfaction and is beyond the influence of the owners and residents. Better to let the community association or owners determine through competition who will best serve their community and their residents at the best price and leave the allocation of these resources to them.

C. Areas Under Tenant Control. The Report and Order extends the current rules regarding Over-the-Air-Reception-Devices ("OTARD") to include antennas used to receive and transmit telecommunications and other fixed wireless signals. Although CAI and its members would prefer to retain control over the placement of wireless antennas in their communities, as long as the size restrictions remain and the enforcement remains fair, our members can accept this limited expansion

of the OTARD rules. CAI would like to confirm, however, that a community association or owner could continue to prohibit even a wireless antenna if the same services were made available by the community association or owner.

IV. COMMENTS ON FURTHER NOTICE OF PROPOSED RULEMAKING

A. Non-discriminatory Access Requirement. The FCC requests further comments on whether it has the legal authority to impose requirements on carriers to ensure nondiscriminatory MTE access and, if so, whether it should exercise that authority. CAI will leave to others the discussion of the FCC's legal authority over carriers. The practical impact of any such requirements falls not only on the carriers but also on the community associations and owners such carriers serve. CAI flatly denies that the FCC has the legal authority to impose requirements that result in "regulation" of community associations and owners. The imposition of such requirements would only deprive the community association or the owner of further property rights—among which would be the right to control access to and protect the integrity of the property. Only by negotiation with each separate service provider can the community association and owner ensure that concerns about damage to the property, security, levels of service and price are satisfactorily addressed on behalf of the residents. In sum, CAI urges the FCC to let the somewhat slower but much more consumer-friendly negotiations in the free market continue instead of compromising long-honored property rights in the name of a level playing field for telecommunications providers.

B. Update on the State of the Market. The FCC seeks to refresh the record on the status of the market for the provision of telecommunications services in MTEs. The basic issue is whether free market forces are working in this area to make competitive telecommunications services available to all who want them or whether the free market is limiting the availability of such services, requiring

further regulation by the FCC. In an effort to assist the FCC in gathering the facts about what is happening across the country, CAI has prepared, circulated to about 8,658 member community associations and tabulated the results of a survey about our members' experiences with obtaining telecommunications services. The survey covered more than just telephony service. Community associations were asked about which telecommunications services were provided and the issues raised in providing those services. CAI's survey of its community association members yielded 873 responses, providing the clearest picture to date of the state of the community association marketplace for video, data and voice services.

- Nearly 40% (131 of 339) of community associations approached by providers in the past year have entered into service agreements.
- Bulk purchase agreements exist in 40% of survey respondents in which the community association provides some type of telecommunications service. Bulk purchases are closely associated with exclusive contracts.
- Many (50) respondents indicate that providers have gained access to the property, but have not begun delivering service.
- Numerous community associations report that a reasonable amount of time passed between the time a provider asked for access to the property and a contract was signed.
- Community associations that enter into contracts with telecommunications services do so in a reasonable amount of time; 73% of the respondents did so within six months.
- Only about 1 in 20 (5.9%) community associations claim to have denied access to a telecommunications company. More than one-in-three of those denials was conveyed within one month.
- Reasons given for not allowing a company access included:
 - no room to run new wiring
 - chose a different provider
 - provider wanted 24-hour/7 day access to property
 - effect on common elements
 - no insurance or indemnification against property damage.
- Only 1% of respondents, a mere 12 of 873, report charging any fees as part of an agreement to provide service. Moreover, such fees are generally limited and/or incentive-based. Fees range

from \$1 for billing on behalf of the provider to fixed annual rates of about \$3,000 to amounts tied to revenue or penetration, ranging from 1 to 5%, and arrangements in exchange for easements.

- More than 100 respondents expressed complaints about equipment installation without consent of the community association. Examples of our members' comments include:
 - wireless TV and satellite TV companies have installed equipment without our knowledge
 - roof damage due to improperly installed equipment
 - running equipment through common property without consent
 - common area torn up, exposed equipment and cables, lack of response to repair requests
 - laying cable over sidewalks creating safety hazards
 - external wiring, drilling into building shell, pirating community association power outlets for equipment transformers
 - company causes damage and does not make timely repairs to streets, landscaping, etc.
 - cosmetic appearance of their equipment
 - unsightly installation

The findings are clear: (1) rather than fighting to keep providers out of their communities, our member associations struggle to attract a provider to offer services to residents; (2) only 1% of our members charge any fees to telecommunications providers (3) only 5.9% of four members denied access to a telecommunications provider; there have been a minority of providers who have caused property damage, security breaches or interruptions in other services to residents of community associations.

C. Exclusive Contracts. CAI and its members are completely opposed to the expansion of the prohibition on exclusive access contracts to residential settings. CAI's members prefer to retain the freedom of contract to negotiate an exclusive or non-exclusive arrangement with one or more providers. Our members prefer to decide for themselves, free of government-imposed limitations, what is the best package of telecommunications services that can be obtained for their residents. Further, while the FCC may be able to prohibit providers from enforcing exclusive access provisions

in existing residential contracts, it should be beyond question that the FCC is not empowered to prohibit community associations and owners from enforcing exclusive access provisions that are to their benefit.

D. Extension of Cable Inside Wiring Rules. CAI fully supports allowing the community association or owner to choose a telecommunications service provider to use home run wiring where an incumbent cable provider no longer has a legal right to maintain its home run wiring in the building. This change expands the competitive options available to consent.

VI. CONCLUSION

Because technology now permits transmission of voice, data, video and internet services over telephone wire, coaxial cable, fiber optic strands or by wireless means, CAI urges the FCC to take a fresh look at the regulation of the telephone, satellite, video and internet service provider companies in an era of ultimate convergence. The FCC (and Congress) will need to reorganize and retool the regulatory framework to provide a meaningful impetus to competition while preserving the investments of providers and protecting the interests of consumers. Because such a fresh look is the only approach likely to have lasting validity (especially in a rapidly changing industry), CAI encourages the FCC to take on the harder job of rationalizing the regulatory system and making it work for all the various telecommunications providers. Although the task of accommodating different economic realities and historical differences in regulatory approach will be exceedingly difficult, it is time to begin. CAI and its members look forward to that future where the benefits of a broad array of telecommunications services will be available to all who want them because the free market has been allowed to work and regulation has played its appropriate role.

APPENDIX 1:
2001 COMMUNITY ASSOCIATIONS INSTITUTE (CAI)
TELECOMMUNICATIONS SURVEY

Submitted January 22, 2001



The nation's voice for condominium, cooperative and homeowner associations

APPENDIX 1

2001 Community Associations Institute (CAI) Telecommunications Survey

Your association's rights are at risk. CAI asks that you take 15 minutes to complete the 2001 CAI Telecommunications Survey and let your voice be heard!

Under the guise of promoting competition, many telecommunications providers are asking state legislatures, Congress, and regulatory agencies to force community associations to permit any telecommunications provider to install equipment on association property without the association's consent, regardless of the association's desire for the service. The proposals have many names including forced entry, forced access, non-discriminatory access and mandatory access. Current Federal Communication Commission (FCC) considerations may sacrifice your rights to the benefit of a few telecommunications companies.

Previous member participation helped CAI argue successfully, on your behalf, to preserve community associations' rights. Please note that the questions ask about your community association, and not your individual home or unit. **Your response to this survey, requested by January 10, 2001, will insure that your voice, as part of many, is heard in Washington.**

**1) What services are currently provided to homeowners through the association?
(select all that apply)**

- a) Cable TV programming without internet/email connection
- b) Satellite TV without internet/email connection
- c) Cable TV programming with internet/email connection
- d) Satellite TV with internet access/email
- e) Local telephone service
- f) Long-distance telephone service
- g) Internet access or e-mail (ISDN/DSL)
- h) Don't know
- i) None
- j) Other, please describe:

225 Reinekers Lane, Suite 300
Alexandria, VA 22314-2875
(703) 548-8600
Fax (703) 684-1581
www.caionline.org

2) How many telecommunications companies (TV programming or internet/email connection) have contacted your association in the past year?

- a) 0 b) 1 c) 2 d) 3 e) 4 or more

3) Have any of those telecommunications companies entered into agreements with your association?

- a) Yes b) No c) Don't know

4) If yes, what company(s) and types of service(s)?

Company _____	Service(s) _____
Company _____	Service(s) _____
Company _____	Service(s) _____

5) Does your association purchase telecommunications services in "bulk"? "Bulk" purchases occur when an association buys telecommunication service on behalf of association members.

- a) Yes b) No

6) Have any telecommunications companies gained access to your property, but have not begun delivering service?

- a) Yes b) No

7) For the most recent contract you have signed with a telecommunications company, how much time passed between the first time you were asked for access to the property until the contract was signed?

- a) Less than 1 month b) 1-2 months c) 3-4 months d) 5-6months
e) More than 6 months f) None g) Don't know

8) Has your community denied access to a prospective telecommunication company?

- a) Yes b) No

9) If you answered yes, how much time passed between the initial request for entry onto the property and the denial?

- a) Less than 1 month b) 1-2 months c) 3-4 months
d) 5-6 months e) More than 6 months

a) Yes b) No

b) No

Amount _____

a) Yes b) No

b) No

b) No company has installed equipment without our consent

a) Time Warner b) Cox c) Comcast d) Direct TV

d) DirectTV

h) None

a) Automatically renews each year b) 1 year

b) 1 year

d) 4-5 years

f) 7 or more years

g) Don't know

17) In what type of community do you live?

- a) Homeowners association
- b) Condominium
- c) Cooperative

18) How would you describe the setting of your community association?

- a) Urban
- b) Suburban
- c) Rural

19) In which metropolitan area do you live, or are you nearest to?

City _____ State _____

20) How many homes, or units, are in your community association?

21) What is the name of your community association?

22) May we contact you for additional information? If yes, please print (if completing this survey on paper) your name and phone number.

Name _____ Phone () _____

Email _____ Zip Code _____

Please return your survey by mail to:

2001 Telecommunications Survey
CAI
225 Reinekers Lane
Suite 300
Alexandria, VA 22314

APPENDIX 2:

**SUMMARY RESULTS OF
2001 COMMUNITY ASSOCIATIONS INSTITUTE (CAI)
TELECOMMUNICATIONS SURVEY**

Submitted January 22, 2001

APPENDIX 2

1) What services are currently provided to homeowners through the association? (select all that apply)	Total (873)
Cable TV programming without internet/email connection	286
Satellite TV without internet/email connection	53
Cable TV programming with internet/email connection	96
Satellite TV with internet access/email	18
Local telephone service	148
Long-distance telephone service	125
Internet access or e-mail (ISDN/DSL)	48
Don't know	4
None	455
Other; please describe:	44
2) How many telecommunications companies (TV programming or internet/email connection) have contacted your association in the past year?	
0	489
1	170
2	98
3	33
4 or more	38
3) Have any of those telecommunications companies entered into agreements with your association?	
Yes	131
No	665
Don't know	4
4) If yes, what company(s) and types of service(s)?	
Company:	
Service(s):	
Company2:	
Service(s):	
Company3:	
Service(s):	

APPENDIX 2 – Community Associations Institute

5) Does your association purchase telecommunications services in "bulk"? "Bulk" purchases occur when an association buys telecommunication service on behalf of association members.	
Yes	171
No	702
6) Have any telecommunications companies gained access to your property, but have not begun delivering service?	
Yes	50
No	823
7) For the most recent contract you have signed with a telecommunications company, how much time passed between the first time you were asked for access to the property until the contract was signed?	
Less than 1 month	21
1-2 months	32
3-4 months	15
5-6 months	16
More than 6 months	31
None	236
Don't Know	123
8) Has your community denied access to a prospective telecommunication company?	
Yes	52
No	821
9) If you answered yes, how much time passed between the initial request for entry onto the property and the denial?	
Less than 1 month	18
1-2 months	9
3-4 months	8
5-6 months	4
More than 6 months	9
10) If your community has denied access to a telecommunications provider, please indicate the reason(s):	63 responses

APPENDIX 2 – Community Associations Institute

11) Does your community charge telecommunications companies any fees to gain access?	
Yes	12
No	857
12) If your association charges for access, how much does your association charge and for what purpose/service?	12 Affirmative Responses
Amount:	various-periodic, annual or a %
Purpose/Service:	
13) Are you aware of any "forced entry" laws in your state that allows telecommunications companies to install equipment in your building without your permission?	
Yes	23
No	850
14) Please describe any problems or concerns your association has experienced when telecommunications companies installed equipment without the association's consent.	
Don't know	67
No company has installed equipment without our consent	257
	122 Comments
15) What company currently provides your association's cable TV programming or other telecommunications services? (check all that apply)	
Time Warner	90
Cox	83
Comcast	97
DirectTV	44
Dish Network	21
Don't Know	40
None	112
Other:	249

APPENDIX 2 – Community Associations Institute

16) What is the term of your association's current telecommunications contract? (choose the one that best describes your situation)	
Automatically renews each year	87
1 year	14
2-3 years	30
4-5 years	1
6-7 years	9
7 or more years	33
Don't know	123
17) In what type of community do you live?	
Homeowners association	401
Condominium	438
Cooperative	9
18) How would you describe the setting of your community association?	
Urban	238
Suburban	506
Rural	111
19) In which metropolitan area do you live, or are you nearest to?	
City:	
20) How many homes, or units, are in your community association?	
21) What is the name of your community association?	
22) May we contact you for additional information? If yes, please provide your name and phone number.	
Name:	
Phone:	
Email:	
Community Associations Institute (CAI) 225 Reinekers Lane, Suite 300, Alexandria, VA 22314 (703) 548-8600	